

***United States Court of Appeals
for the Second Circuit***



AMICUS BRIEF

77-7145

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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THE GUARDIANS ASSOCIATION OF THE NEW YORK
CITY POLICE DEPARTMENT, INC., HISPANIC
SOCIETY OF THE NEW YORK CITY POLICE
DEPARTMENT, INC., OSWALDO PEREZ AND FELIX
E. SANTOS, INDIVIDUALLY AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,

APPELLEES

- against -

CIVIL SERVICE COMMISSION OF THE CITY OF
NEW YORK, DEPARTMENT OF PERSONNEL OF THE
CITY OF NEW YORK, THE NEW YORK CITY POLICE
DEPARTMENT, ALPHONSE D'AMBROSE, INDIVIDUALLY
AND IN HIS CAPACITY AS CHAIRMAN OF THE CIVIL
SERVICE COMMISSION OF THE CITY OF NEW YORK
AND PERSONNEL DIRECTOR OF THE CITY OF NEW
YORK, JAMES SMITH AND JOSEPHINE GAMBINO,
INDIVIDUALLY, AND IN THEIR CAPACITY AS MEMBERS
OF THE CIVIL SERVICE COMMISSION OF THE CITY
OF NEW YORK, AND MICHAEL J. CODD, INDIVIDUALLY
AND IN HIS CAPACITY AS COMMISSIONER OF THE
NEW YORK CITY POLICE DEPARTMENT.

APPELLANTS

-----X
AMICUS CURIAE BRIEF

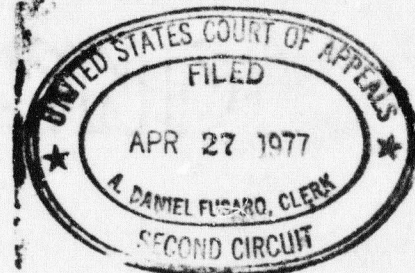


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PRELIMINARY STATEMENT

Various Police Officers and furloughed Police Officers whose seniority rights are in jeopardy by reason of the action herein brought by Appellees submit this Brief Amicus Curiae on this Appeal from the Order of Judge Robert L. Carter entered March 17th, 1977 in the United States District Court for the Southern District of New York granting a Temporary Injunction restraining appointments to the Police Department on the alleged grounds that Appellees rights secured by Title VII of the Civil Rights Law have been violated by reason of discrimination in tests given prior to the extension of the application of Title VII to municipalities.

STATEMENT OF FACTS

Appellees commenced an action in the Court below on behalf of certain Black and Puerto Rican Police Officers to jump their seniority positions on grounds that examinations failed by them in the past and height requirements were racially discriminating thereby allegedly entitling these Appellees to relief, relying upon the Fourteenth Amendment 42 USC 1981 and 1983 and Title VII of the Civil Rights Law.

The Court below granted a Temporary Injunction Staying Re-Employment of Police Officers, pending the ultimate decision of the Court. It was stipulated by Appellants that any Officer reappointed must sign a consent that he is subject to termination should new priorities be established by the Court below based upon the alleged Title VII discrimination finding.

An appeal has been taken from this Order which is scheduled to be heard in this Court on April 28, 1977.

There is a defined group of discharged Police Officers, White, Black and Puerto Rican, whose seniority status is subject to being divested as a result of the proceeding herein. Nevertheless, despite the fact that they were indispensable parties within the meaning of Rule 19A of the Federal Rules of Civil Procedure, they were never given Notice of the proceeding in order to make a Motion to intervene. On the other hand, the certification of the Class, pursuant to Rule 23 of the Federal Rules of Civil Procedure was clearly improper in that Black and Hispanic Officers who passed the Civil Service Examination are subject to the loss of their jobs should Appellees prevail in this action. Nevertheless, Judge Carter certified the

class of Black and Hispanic Officers to include these whose interests are diametrically opposed to that of Appellees. One specific Officer, ALFRED N. BLAND, who has retained ANTHONY V. LOMBARDINO, ESQ., in this action, is supposedly a Member of the Class certified by Judge Carter. Nevertheless, he stands to lose his job if the class prevails.

The Civil Service Examinations challenged by Appellees in the Court below were clearly job and performance related and it is strongly urged that Judge Carter employed improper measuring tools to determine whether or not they were discriminatory in violation of Title VII. In addition, Judge Carter has given Title VII retroactive affect in clear violation of the law.

Had the former officers herein not been furloughed from their job, a Title VII Action could not have been instituted to divest them of their rights. The fortuitous circumstances of a temporary furlough should not divest hem of rights never intended to be subject to challenge of Title VII.

In short, within the meaning of Rule 19A of the Federal Rules of Civil Procedure, furloughed Police Officers and those on the Force whose seniority was subject to divestment by this action should have been joined as indispensable parties. Therefore, the Temporary Injunction granted by Judge Carter should be reversed and the matter remanded with directions to join either as a Class or Individually the determinable group of Police Officers whose rights are subject to impairment.

ARGUMENT

THE COURT BELOW WAS WITHOUT JURISDICTION TO GRANT A TEMPORARY INJUNCTION WITHOUT JOINDER OF INDISPENSIBLE PARTIES, PURSUANT TO RULE 19 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Rule 19 of the Federal Rules of Civil Procedure, provides as follows:

(a) A person who is subject to service of process and whose joinder will not deprive the Court of jurisdiction over the subject matter of the action shall be joined as a party in the action if

(1) in his absence complete relief cannot be accorded among those already parties, or

(2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (1) as a practical matter impair or impede his ability to protect that interest or (11) leave any of the persons already parties subject to a substantial risk of incurring double, multiple or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the Court shall order that he be made a party."

Klamath and Modic Tribes v. Maison, 338 F2d 620 (9th Circ. 1964). It was held that the District Court was without jurisdiction to declare the rights of Members of a Tribe that were not parties to an action and that such judgment would not be binding on them. In the case at bar, Judge Carter ruled that a Class of Blacks and Hispanics had been discriminated against and therefore, were entitled to re-employment as Police Officers in preference to the seniority rights of Officers, not joined as parties. The ruling in Klamath clearly holds the ruling of Judge Carter to be

jurisdictionally defective. Thus, it has been held in an action charging discrimination in employment, the Union is a indispensable party where the rights of employees are determined by the Union Contract, United States v. National Lead Co., 315 F. Supp. 912 (E.D. Mo., 1970) Aff'd 438 F.2d, 935 (8th Circ. 1971) "One of the elementary principles of law is that every man is entitled to his day in Court. He is entitled to conduct his own trial, to produce his own evidence, to examine the records and to cross examine the witnesses, and it should not be done by someone whom he has never selected and who may and may not have and hold a different status in the controversy."

Womens Catholic Order of Forresters v. City of Arlington, 28 F. Supp. 663 (N.D. Tex. 1939).

Indeed, it has been held that a case is dismissible where indispensable parties are not named in an action.

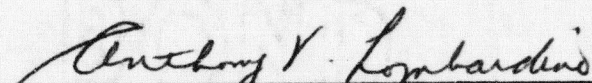
Schwenn v. Pamida, 392 Fed. Supp. 69 D.C. Wyoming, 1975.

The furloughed Police Officers whose seniority rights are at stake were indispensable parties to this action. Any Order handed down in this action including the Temporary Injunction in the Court below, was jurisdictionally defective without notice to the furloughed officers for opportunity to defend their seniority rights. In short, they were indispensable parties to this action.

C O N C L U S I O N

THE ORDER GRANTING A TEMPORARY INJUNCTION
IN THIS ACTION SHOULD BE REVERSED FOR
FAILURE OF APPELLEES TO JOIN INDISPENSIBLE
PARTIES IN THIS ACTION.

RESPECTFULLY SUBMITTED,



ANTHONY V. LOMBARDINO
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275-0200

AFFIDAVIT OF SERVIDE

STATE OF NEW YORK :

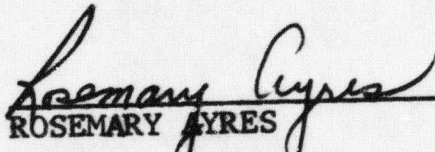
SS.:

COUNTY OF QUEENS :

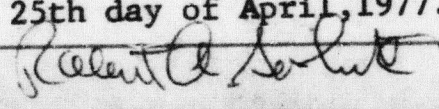
ROSEMARY AYRES, BEING DULY SWORN, DEPOSES AND SAYS:

Deponent is not a party to this action, is over 18 years of age and resides at Kew Gardens, New York.

On April 25, 1977, deponent served the within Brief Amicus Curiae upon CHRISTOPHER CROWLEY, SARA E. STEINBOCK, Attorneys for Appellees, OSCAR GARCIA-RIVERA, KENNETH KIMERLING, Attorneys for Puerto Rican Legal Defense and Education Fund, In., and W. BERNARD RICHLAND, Corporation Counsel, at 1 Chase Manhattan Bank, New York, New York 10005, 95 Madison Avenue, New York, New York and Municipal Building, New York, New York 10007, respectively, the addresses designated by said Attorneys for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper in official depository under the exclusive care and custody of the United States Postal Service within the State of New York.


ROSEMARY AYRES

Sworn to before me this
25th day of April, 1977.


ROBERT A. SOSHNICK
NOTARY PUBLIC, State of New York
No. 4621716
Qualified in Queens County
Commission Expires March 30, 1980